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REPORT OF THE WORKING GROUP ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

I. Introduction

1. At its 2393rd meeting, on 1 June 1995, the International Law Commission decided to establish a Working Group on the topic "International liability for injurious consequences arising out of acts not prohibited by international law". The Working Group was composed of the following members: Mr. Julio Barboza (Special Rapporteur and Chairman), Mr. John de Saram, Mr. Gudmundur Eiriksson, Mr. Nabil Elaraby, Mr. Salifou Fomba, Mr. Igor I. Lukashuk, Mr. Robert Rosenstock, Mr. Alberto Szekely and Mr. Chusei Yamada.

2. The Working Group was entrusted with the mandate of identifying the activities which came within the scope of the topic.

3. The Working Group held three meetings between 23 June to 5 July 1995. It had before it a document prepared by the secretariat, presenting an overview of the ways in which the scope of multilateral treaties dealing with transboundary harm and with liability and prevention had been defined in terms of the activities or substances to which they applied.

II. Various ways of identifying the activities covered by the topic considered by the Working Group

4. The Working Group examined the practice of some other multilateral treaties. It took note of the fact that most of the treaties addressing issues of transboundary harm, particularly the issues of liability for such harm, were designed to deal with a specific type of activity or substance, such as oil or nuclear material or carriage of such material, for example, by ship. Treaties in this group defined their scope and subject-matter, namely the substances or activities to which they applied, in one of their articles with no need for any further clarification.

5. Some treaties addressing issues of transboundary harm or liability define their scope in general terms and provide a list of activities or substances, either within the body of the treaty or in an annex thereto. Treaties in this group address either a specific type of activity or substance, or a broader category of activities or substances. Some of them, particularly those that have a narrow scope, contain a standard amendment clause but do not include a provision for meetings of the Parties to update the list of activities or substances. Others include a provision on conditions and procedures for reviewing and updating the list of activities or substances to which they apply.

6. In the light of the practice described in paragraphs 4 and 5 above, the Working Group studied and evaluated a number of alternatives suggested by the members of the Group for the articles being prepared by the Commission. The first alternative was to leave the current definition in articles 1 and 2, as it is sufficient to enable States to determine whether a particular activity falls within scope of the articles. The second alternative was to draw up a list of activities or substances that are to be covered by this topic and to annex the list to the draft articles. The third alternative took account of the close relationship between the liability regime and the need for specification of the scope of the topic and accordingly proposed deferring consideration of this issue until the Commission has completed its work on the next stage of the liability regime.

7. Statements made in the Sixth Committee of the General Assembly as well as by some members of the Commission had indicated concerns that definitional articles do not provide sufficient guidance to States to enable them to comply with the obligations that are set forth in respect of prevention. Consequently, the Working Group recognizes that the first alternative would not respond to these concerns which are moreover equally applicable to the obligations which will be imposed under the regime of liability.

8. The Working Group found the second alternative, drawing up a list of activities or substances to which the articles would apply, premature at this stage of the work of the Commission. In the view of the Working Group, the degree of specification needed in this topic is directly linked to the type of obligations which will be imposed by the articles on liability. Issues such as, for example, the basis of liability, modalities of making claims for compensation, forms and content of compensation, compensable harm, etc., will determine the extent to which the scope of the topic should be specified.

9. The Working Group opted for the third alternative, namely to revisit the question of providing more specificity to the scope of the articles once the Commission has completed its work on issues dealing with liability. At that

stage, the Commission will be in a better position to make a decision on the issue. The Commission would then have adopted a complete liability regime, together with a regime for prevention and with specific provisions regarding the relationship between the two regimes. It would also have received views of the Sixth Committee and possibly written comments from Governments on the entire regime which would enable the Commission to better assess their needs and preferences. The Working Group, however, is aware that the Commission and Governments, at this stage of the work, must have a general idea of the kind of activities covered by the topic. The Working Group is of the view that the lists of activities that exist in a number of conventions dealing with issues of transboundary harm and, in particular, the Convention on Environmental Impact Assessment in a Transboundary Context, of 25 February 1991, the Convention on Transboundary Effects of Industrial Accidents of 17 March 1992 and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 9 March 1993 will provide that general idea. The Working Group is not suggesting that the activities or substances listed in the annexes to the aforementioned conventions should be or will necessarily be among the activities within the scope of the topic. Nor does it suggest that the Commission follow their model of identification. It suggests that those lists are useful to provide the Commission with a general idea of the types of activities to which this topic applies for the purposes of the next stage of the work, namely the liability regime.

III. Conclusion of the Working Group

10. The Working Group recognizes that the Commission must in its future work, have a general idea of the kind of activities to which the draft articles on the topic apply. The definition of the scope of the topic, as provided in articles 1 and 2, may, in itself, not be sufficient for the next stage of the work. The Working Group, however, is of the view that the Commission can work on the basis that the types of activities listed in those conventions come within the scope of the topic as defined in articles 1 and 2. The Working Group recognizes that, at some later stage, States may require more specificity in the articles on the types of activities falling within the ambit of the topic. That specification, however, will depend on the provisions on prevention and the nature of the obligations on liability which the Commission will be developing. One way of achieving that specification would be to prepare a list of activities through a method which the Commission could recommend at a later stage of work.

IV. Recommendation of the Working Group

11. The Working Group recommends that the Commission adopt the conclusion set out in paragraph 10 as its own recommendation.